METRECO INDUSTRIES SDN BHD v. MUHAMMAD FADHIL AB WAHID & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: B-02(IM)(NCVC)-143-01-2018 &
B-02(IM)(NCVC)-396-02-2018]
13 MARCH 2019

CIVIL PROCEDURE: *Striking out – Application for – Plaintiff commenced second suit after first suit struck out by court – Second suit involved similar cause of action on same subject matter against same party for different reliefs – Whether res judicata – Whether decision in first suit final – Whether binding on court – Whether issues already determined could be raised by parties in subsequent suit – Failure to appeal against order in first suit – Whether amounted to concession that decision in first suit correct – Whether attempt to circumvent appeal procedure deliberate – Whether abuse of court process*

The appellant ('plaintiff') discovered that some excavation works being carried out on his land and there were also lorries and machineries on the land. The signboard erected on the adjacent plot named the third defendant as the contractor responsible for the clearing of the land. As a result, the plaintiff instituted a suit against the third defendant ('the first suit'), as the sole defendant, for trespass on the land. The plaintiff pleaded, *inter alia*, that the plaintiff suffered losses from the removal/extraction of sand, which caused depreciation in the market value of the land. The plaintiff thus sought compensation for the losses. The third defendant filed an application to strike out the first suit on the grounds that: (i) the plaintiff lodged a police report naming other individuals, namely Kenneth and Fairus, as the persons who committed trespass on the land and the third defendant was never mentioned in the police report as a person who was involved in the trespass; (ii) four persons were charged for trespass and theft of sand in the Sepang Sessions Court where two of them pleaded guilty to trespass whilst two other persons, of which the third defendant was one of them, claimed trial; (iii) the signboard which named the third defendant as contractor was erected on the adjacent plot of land; (iv) the lorries and machineries on the plaintiff's land did not belong to the third defendant; and (v) there were no material facts pleaded by the plaintiff in the statement of claim to show that the plaintiff had a cause of action in trespass against the third defendant or that it was the third defendant who committed the offence of theft of sand from the plaintiff's land. The High Court Judge allowed the third defendant's application for striking out on 5 August 2015. The plaintiff did not appeal against the decision. Subsequently, the plaintiff filed another suit against several defendants including the second and third defendants, premised on

the same cause of action ('the second suit'). The second and third defendants filed separate striking out applications. The third defendant premised his striking out application on the basis that the second suit arose from the same cause of action as per the first suit. The third defendant's main contention was that since the first suit was struck out and there had been no appeal against that decision, the plaintiff was barred by *res judicata* from filing the second suit. The High Court allowed the striking out application by the third defendant and held that the second suit was caught by the principle of *res judicata*. The second defendant premised his striking out application on grounds of no reasonable cause of action, *res judicata* and that the plaintiff's claim was scandalous, frivolous, vexatious and abuse of court process. The second defendant's striking out application was also allowed. Hence, the appeals herein by the plaintiff against the third defendant (appeal 143) and the second defendant (appeal 396). The main issue for determination was whether the second suit against the second and the third defendants was barred by *res judicata*.

Held (allowing appeal 396 with costs; dismissing appeal 143 with costs) Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) Even though the reliefs sought in the first suit was purportedly different from the second suit, *res judicata* still bit, as the factual matrices, the cause of action and the parties, namely, the plaintiff and the third defendant, were the same. *Res judicata* also applied to issues or facts which are part of the subject matter of litigation which might have been and which were not brought forward, though not actually decided by the court. The relief prayed for, was premised on the same cause of action of trespass to the same land. The declaration sought in the second suit could have been brought up in the first suit. Therefore, the plaintiff was estopped from bringing a similar cause of action on the same subject matter against the third defendant. (paras 35 & 36)

(2) There was no merit in the plaintiff's argument that the Order dated 5 August 2015 was not a final order. The decision given by the High Court Judge in the first suit was based on the same subject matter and the issue was binding on the court at a later stage in the same suit or in the second subsequent suit. An issue that had already been determined either expressly or by necessary implication cannot be raised by parties a second time in a subsequent suit. (paras 38 & 39)

(3) Further, the fact that the second suit involved other defendants was not a basis to say that the second suit against the third defendant was different from the first suit. Regardless, the principle of *res judicata* was not affected by the absence of the other parties in the first suit. The fact that the parties in the second suit were different from the first suit did not disentitle the third defendant from invoking the doctrine of issue estoppel to bar the plaintiff from relitigating a specific issue that had

been litigated in the first suit. The third defendant was a party in the first suit and also a party in the second suit, except that he was being sued with other defendants. (para 40)

(4) In seeking to distinguish the first and the second suits by stating that the capacity in which the third defendant was sued was different, in that, the first suit was brought through himself and/or his agent trading under the name and style of 'Sri Gumut Enterprise', the plaintiff misled the court. The third defendant was the sole proprietor of Sri Gumut Enterprise and was not a separate entity that was sued in his individual capacity. The third defendant was sued in his individual capacity in the first suit and also in the second suit, and being the sole proprietor, the third defendant retained the same liabilities. (para 41)

(5) The guilty plea on the charges under ss. 379 and 447 of the Penal Code by the third defendant in the Sepang Sessions Court, one year after the decision on 5 August 2015, also could not be a basis to override the principle of *res judicata*. Also, there had been no appeal by the plaintiff against the decision dated 5 August 2015, but instead the plaintiff chose to file the second suit against the third defendant premised on the same set of facts and same issues. This amounted to: (i) a concession that the decision of the trial judge in the first suit was correct and therefore, the plaintiff was precluded from canvassing the same argument in the second suit; and (ii) a deliberate attempt to circumvent the necessary appeal procedure and therefore amounted to an abuse of court process. (paras 42 & 43)

(6) From the pleadings in the first suit, the plaintiff did not know of the existence of the second defendant at that point in time and therefore the second defendant was not involved in the first suit. The second defendant was not precluded from raising and arguing the defence of *res judicata* at the trial. There will be no prejudice to parties, if the matter was to proceed with full trial. However, the plaintiff would be seriously prejudiced if the matter was struck out at this stage, as the plaintiff would be deprived of the opportunity to prove his case. There were issues fit for trial and therefore, the plaintiff should be given his day in court against the second defendant. Hence, the second suit against the second defendant should go for trial. (paras 49 & 52)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') mendapati kerja-kerja penggalian dijalankan atas tanahnya dan juga terdapat lori-lori dan mesin-mesin atas tanah itu. Papan tanda yang dinaikkan di tanah bersebelahan menamakan defendan ketiga sebagai kontraktor yang bertanggungjawab untuk pembersihan tanah itu. Akibatnya, plaintif memulakan guaman terhadap defendan ketiga ('guaman pertama'), sebagai satu-satunya defendan, untuk pencerobohan atas tanah itu. Plaintif memplidkan, antara lain, bahawa plaintif mengalami kerugian daripada pengalihan/penggalian pasir, yang menyebabkan kejatuhan nilai pasaran

A tanah itu. Oleh itu, plaintif memohon pampasan untuk kerugian tersebut. Defendan ketiga memfailkan permohonan pembatalan guaman pertama atas alasan bahawa: (i) plaintif membuat laporan polis menamakan individu-individu lain, iaitu, Kenneth dan Fairus, sebagai orang yang melakukan pencerobohan atas tanah dan defendan ketiga tidak pernah disebut dalam
B laporan polis itu sebagai orang yang terlibat dalam pencerobohan; (ii) empat orang dituduh untuk pencerobohan dan mencuri tanah di Mahkamah Sesyen Sepang dan dua daripada mereka mengaku bersalah menceroboh manakala dua yang lain, salah seorang daripadanya ialah defendan ketiga, memohon dibicarakan; (iii) papan tanda yang menamakan defendan ketiga sebagai
C kontraktor dinaikkan di plot tanah bersebelahan; (iv) lori-lori dan mesin-mesin atas tanah plaintif bukan milik defendan ketiga; dan (v) tiada fakta material diplid oleh plaintif dalam penyataan tuntutan untuk menunjukkan plaintif mempunyai kausa tindakan dalam pencerobohan terhadap defendan ketiga atau defendan ketiga yang melakukan kesalahan mencuri tanah dari tanah plaintif. Hakim Mahkamah Tinggi membenarkan permohonan
D defendan ketiga untuk pembatalan pada 5 Ogos 2015. Plaintif tidak merayu terhadap keputusan itu. Kemudian, plaintif memfailkan satu lagi guaman terhadap beberapa defendan termasuk defendan kedua dan ketiga, berdasarkan kausa tindakan sama ('guaman kedua'). Defendan kedua dan ketiga memfailkan permohonan-permohonan pembatalan secara berasingan.
E Defendan ketiga menyandarkan permohonan pembatalannya pada alasan bahawa guaman kedua timbul daripada kausa tindakan yang sama dengan guaman pertama. Hujahan utama defendan ketiga ialah, oleh sebab guaman pertama telah dibatalkan dan tiada rayuan terhadap keputusan itu, plaintif dihalang oleh *res judicata* daripada memfailkan guaman kedua. Mahkamah
F Tinggi membenarkan permohonan pembatalan oleh defendan ketiga dan memutuskan bahawa guaman kedua terhalang oleh prinsip *res judicata*. Defendan kedua menyandarkan permohonan pembatalannya atas alasan-alasan tiada kausa tindakan munasabah, *res judicata* dan bahawa tuntutan plaintif mengaibkan, remeh, menyusahkan dan satu penyalahgunaan proses
G mahkamah. Permohonan pembatalan defendan kedua juga dibenarkan. Dengan itu, rayuan-rayuan ini oleh plaintif terhadap defendan ketiga (rayuan 143) dan defendan kedua (rayuan 396). Isu utama untuk pertimbangan mahkamah adalah sama ada guaman kedua terhadap defendan kedua dan ketiga terbatas oleh *res judicata*.

H **Diputuskan (membenarkan rayuan 396 dengan kos; menolak rayuan 143 dengan kos)**

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

I **(1)** Walaupun relief-relief yang dipohon dalam guaman pertama dikatakan berbeza daripada guaman kedua, *res judicata* masih terpakai, kerana matriks fakta, kausa tindakan dan pihak-pihak, iaitu, plaintif dan defendan ketiga, adalah sama. *Res judicata* juga diguna pakai untuk isu-isu atau fakta-fakta yang menjadi sebahagian perkara litigasi yang boleh tetapi tidak dikemukakan, walaupun tidak sebenarnya diputuskan oleh

mahkamah. Relief yang dipohon, adalah berdasarkan atas kausa tindakan pencerobohan tanah yang sama. Deklarasi yang dipohon dalam guaman kedua sepatutnya dikemukakan dalam guaman pertama. Oleh itu, plaintif diestop daripada membawa kausa tindakan yang serupa atas perkara sama terhadap defendan ketiga.

(2) Tiada merit dalam hujahan plaintif bahawa Perintah bertarikh 5 Ogos 2015 bukan perintah muktamad. Keputusan yang diberi oleh Hakim Mahkamah Tinggi dalam guaman pertama berasaskan pada perkara yang sama dan isu itu mengikat mahkamah di peringkat kemudian dalam guaman yang sama atau dalam guaman kedua terkemudian. Satu isu yang telah diputuskan sama ada secara langsung atau secara implikasi yang perlu, tidak boleh dibangkitkan oleh pihak-pihak pada kali kedua dalam guaman terkemudian.

(3) Selanjutnya, fakta bahawa guaman kedua melibatkan defendan-defendan lain bukan asas untuk menyatakan bahawa guaman kedua terhadap defendan ketiga berbeza daripada guaman pertama. Walau bagaimanapun, prinsip *res judicata* tidak terjejas dengan ketiadaan pihak-pihak lain dalam guaman pertama. Fakta bahawa pihak-pihak dalam guaman kedua berbeza daripada guaman pertama tidak menafikan hak defendan ketiga untuk membangkitkan doktrin isu estopel untuk menghalang plaintif daripada melitigasi semula isu yang spesifik yang telah dilitigasi dalam guaman pertama. Defendan ketiga adalah pihak dalam guaman pertama dan juga pihak dalam guaman kedua, kecuali dia disaman dengan defendan-defendan lain.

(4) Dalam memohon untuk membezakan guaman-guaman pertama dan kedua dengan menyatakan bahawa kapasiti defendan ketiga disaman adalah berbeza, iaitu, guaman pertama dimulakan melalui dirinya sendiri dan/atau agennya yang berniaga atas nama dan gaya 'Sri Gumut Enterprise', plaintif memperdaya mahkamah. Defendan ketiga adalah pemilik tunggal Sri Gumut Enterprise dan bukan entiti berasingan yang disaman dalam kapasiti perseorangan. Defendan ketiga disaman dalam kapasiti perseorangan dalam guaman pertama dan juga dalam guaman kedua, dan sebagai pemilik tunggal, defendan ketiga mengekalkan liabiliti yang sama.

(5) Pengakuan salah atas kesalahan bawah ss. 379 dan 447 Kanun Keseksaan oleh defendan ketiga di Mahkamah Sesyen Sepang, setahun selepas keputusan pada 5 Ogos 2015, juga tidak boleh menjadi asas untuk mengatasi prinsip *res judicata*. Malahan, tiada rayuan oleh plaintif terhadap keputusan bertarikh 5 Ogos 2015, sebaliknya plaintif memilih untuk memfailkan guaman kedua terhadap defendan ketiga berdasarkan set fakta-fakta dan isu-isu yang sama. Ini bermaksud: (i) konsesi bahawa keputusan hakim bicara dalam guaman pertama adalah betul dan oleh itu, plaintif dihalang daripada menggunakan hujahan yang sama dalam guaman kedua; dan (ii) cubaan sengaja untuk memintas prosedur rayuan yang perlu dan oleh itu, membentuk penyalahgunaan proses mahkamah.

(6) Berdasarkan pliding dalam guaman pertama, plaintif tidak mengetahui kewujudan defendan kedua pada ketika itu dan oleh itu, defendan kedua tidak terlibat dalam guaman pertama. Defendan kedua tidak dihalang daripada membangkitkan dan menghujahkan pembelaan *res judicata* dalam perbicaraan. Tiada prejudis pada pihak-pihak jika perkara itu diteruskan dengan perbicaraan penuh. Walau bagaimanapun, plaintif akan mengalami kemudaratan serius, jika perkara itu dibatalkan di peringkat ini, kerana plaintif akan dinafikan peluang untuk membuktikan kesnya. Terdapat isu yang sesuai untuk dibicarakan dan oleh itu, plaintif wajar diberi peluang untuk dibicarakan di mahkamah terhadap defendan kedua. Oleh itu, guaman kedua terhadap defendan kedua perlu dibicarakan.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***

Manoharan Malayalam v. Menteri Dalam Negeri Malaysia & Anor [2009] 2 CLJ 839 FC ***(refd)***

Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271 FC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***

Wong Yoon Yar v. Lin Yin Thai & Ors [1987] 1 LNS 21 SC ***(refd)***

Legislation referred to:

Penal Code, ss. 34, 379, 447

Rules of Court 2012, O. 18 r. 19(1)(a)

(Civil Appeal No: B-02(IM)(NCVC)-143-01-2018)

For the appellant - Normaslina Abdul Fuad & Mohd Azzamuddin Shah Yaakup; M/s BH Gan Nor & Kim

For the respondent - Nur Sazila Abd Halim; M/s Iza Ng Yeoh & Kit

(Civil Appeal No: B-02(IM)(NCVC)-396-02-2018)

For the appellant - Normaslina Abdul Fuad & Mohd Azzamauddin Shah Yaakup; M/s BH Gan, Nor & Kim

For the respondent - Hasmaliza Othman; M/s Fairuz Adiba & Partners

[Editor's note: Appeal from High Court, Shah Alam; Suit No: BA-22NCVC-454-07-2017 (overruled in part).]

Reported by S Barathi

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] There are two related appeals by the appellant (the plaintiff in the court below) against the decision of the learned High Court Judge which allowed striking out applications by the respondents (the second and third defendants in the court below), namely:

(i) Appeal B-02(IM) (NCVC)-143-01-2018 (Appeal 143); and

(ii) Appeal B-02(IM) (NCVC)-396-02-2018 (Appeal 396).

[2] Appeal 143 is in respect of the decision of the learned High Court Judge on the third defendant's striking out application, whilst Appeal 396 is in respect of the decision of the learned High Court Judge on the second defendant's striking out application. Both appeals originated from a single suit in the High Court, namely BA-22NCVC-454-2017, wherein the second and the third defendants filed separate applications to strike out the plaintiff's writ and statement of claim.

[3] Having perused the appeal records and having considered the submissions of both parties, unanimously, we allowed Appeal 396 with costs of RM10,000 here and below to be paid to the appellant subject to allocator and dismissed Appeal 143 with costs of RM10,000 to be paid to the respondent here and below subject to allocator. We ordered the matter in Appeal 396 to proceed with full trial in the High Court. Hereinbelow are our reasons for deciding so.

[4] Parties will be referred to as they were in the High Court.

Background

[5] The plaintiff, Metreco Industries Sdn Bhd, owns a property known as Lot PT 36842, HSD 20256, at Mukim Dengkil, Daerah Sepang, Selangor (the land).

[6] The third defendant is the sole proprietor of Sri Gumut Enterprise.

[7] It is the plaintiff's case that it discovered some excavation works being carried out on the land and there were lorries and machineries on the land. There was a signboard erected on the adjacent plot of land beside the land of the plaintiff which named the third defendant as the contractor responsible for the clearing of the land.

The First Suit

[8] As a result, on 12 February 2015, the plaintiff instituted a suit against the third defendant, namely Shah Alam High Court Suit 22NCVC-80-02-2015 (the first suit) for trespass on the land.

[9] In this first suit, the third defendant was the sole defendant. And it was pleaded by the plaintiff in its statement of claim that:

(i) On or about January 2015, the plaintiff discovered that the third defendant, either by himself or through his workers, servants or agents and without the plaintiff's knowledge/consent, had trespassed into the land. It was also alleged that the third defendant, without the plaintiff's consent/knowledge had carried out digging work and removed sand out from the said land (paras. 4 and 5 of the statement of claim);

(ii) As a result, the plaintiff suffered losses arising from the removal/extraction of sand and alleged that the third defendant's conduct has caused depreciation in the market value of the land. The plaintiff sought to be compensated for the losses suffered (para. 7 of the statement of claim);

(iii) There was at the material time a notice board and fence made of zinc plates erected on the land, however the notice board was erected on the land beside the plaintiff's land. The notice board contains the Selangor state emblem with the following words:

> Kerja-Kerja Mencuci Tanah Dan Tapak Semaian Bagi Tujuan Perladangan Dengan Kerjasama Kerajaan Negeri Selangor di kawasan Puchong, Daerah Dengkil, Selangor;
>
> Kontraktor: Sri Gumut Enterprise (00993472-X)
> No 15B, Jalan Pelabur B 23B, Seksyen 23,
> 40300 Shah Alam
> Selangor

(para. 10 of the statement of claim)

[10] Paragraph 11 of the statement of claim further states:

> Defendan iaitu kontraktor yang dinamakan di dalam papan tanda tersebut secara sendiri atau melalui pekerja, pengkhidmat, ejennya atau sebaliknya telah menceroboh, menyalahi undang-undang tanah, tidak berkuasa atau tidak berhak untuk membuat kerja-kerja cadangan sedemikian di atas Tanah lot milik Plaintif.

[11] The third defendant filed a striking out application in the first suit premised on the following grounds:

(i) The plaintiff lodged a police report on 28 January 2015, naming other individuals, namely Kenneth and Fairus, as the persons who committed trespass on the land. The third defendant was never mentioned in the police report as a person who was involved in the trespass;

(ii) four persons were charged for trespass and theft of sand in the Sepang Sessions Court where two of them pleaded guilty to trespass whilst two other persons (of which the third defendant was one of them) claimed trial;

(iii) The signboard which named the third defendant as contractor was erected on the adjacent plot of land (Lot PT 036841) which belongs to Plenitude Permai Sdn Bhd;

(iv) The lorries and machineries on the plaintiff's land did not belong to the third defendant;

(v) There was no material facts pleaded by the plaintiff in the statement of claim to show that the plaintiff has a cause of action in trespass against the third defendant or that it was the third defendant who committed the offence of theft of sand from the plaintiff's land.

[12] It was averred by the third defendant in the striking out application in the first suit, that the suit by the plaintiff against the third defendant was premised on the notice board which was erected on the land beside the plaintiff's land, which named the third defendant as the contractor responsible for clearing works on the land.

[13] The striking out application by the third defendant was allowed by the learned High Court Judge and the plaintiff's statement of claim was effectively struck out on 5 August 2015. The plaintiff did not file any appeal against 5 August 2015 decision. The second defendant had no knowledge of the first suit.

The Second Suit

[14] On 28 July 2017, the plaintiff filed another suit, BA-22NCVC-454-2017 (the second suit) against several defendants, including the second and third defendants, premised on the same cause of action. This is the suit which the present two appeals originated from. In this second suit, the plaintiff pleaded in its statement of claim as follows:

(i) On 19 January 2015 the plaintiff found out that unidentified personnel, which was later identified as the fourth defendant, has without the plaintiff's consent and/or permission, trespassed into the land. (paras. 7 and 8 of the statement of claim);

(ii) The plaintiff found out that there were machineries used for land digging and sand extraction activities on the said land (para. 10 of the statement of claim);

(iii) On 4 February 2015, the plaintiff found out that:

(a) the land was fenced up by zinc plates and was placed between the border of the land and Lot PT 036841 owned by Plenitude Permai Sdn Bhd;

(1) the entrance gate to the land has been locked;

(2) a notice board was erected at the entrance of the land which has the Selangor state emblem with the following words:

A Kerja-Kerja Mencuci Tanah Dan Tapak Semaian Bagi Tujuan Perladangan Dengan Kerjasama Kerajaan Negeri Selangor di kawasan Puchong Daerah Dengkil, Selangor;

Kontraktor: Sri Gumut Enterprise (00993472-X)
No 15B, Jalan Pelabur B 23B, Seksyen
B 23, 40300 Shah Alam
Selangor

(3) a police report was lodged by the plaintiff and a representative of the owner of Lot PT 036841;

C (4) Sri Gumut Enterprise is the contractor named on the said notice board and the third defendant is the sole proprietor stated therein (para. 15 of the statement of claim);

(5) the alleged trespass and the alleged extraction of sand caused the plaintiff to suffer losses due to depreciation in value of the land and costs incurred to repair and restore the condition of the said
D land;

(6) the plaintiff sought, as its relief, a declaration that the defendants, jointly and severally, whether by themselves or through employees and agents, had committed trespass on the
E plaintiff's land and orders for general damages, compensatory damages, aggravated and exemplary damages, interest and costs;

(7) on or about March 2015, the first, second, third and fourth defendants were charged jointly on 23 March 2015 at the Sepang Sessions Court on two charges, namely under:

F (i) section 379 read together with s. 34 Penal Code for the offence of theft of sand belonging to the plaintiff;

(ii) section 477 read together with s. 34 of the Penal Code for the offence of trespass committed between 19 January 2015 until
G 18 March 2015 on the land.

The first and the second defendants pleaded guilty and were sentenced. Whereas the third and the fourth defendants claimed trial and the trial proceeded on 27 June 2016 until 17 August 2016. However, on 30 July 2016, the third and the fourth defendants
H pleaded guilty and were sentenced accordingly.

[15] In the second suit, the second and third defendants filed separate striking out applications which were heard by different High Court Judges on different dates.

I **[16]** The third defendant premised his striking out application on the basis that the second suit arose from the same cause of action as per the first suit. The third defendant's main contention is that since the first suit was struck out and there has been no appeal against that decision, the plaintiff is barred

by *res judicata* from filing the second suit. On 18 December 2017, the High Court allowed the striking out application by the third defendant and held that the second suit is caught by the principle of *res judicata*.

[17] The second defendant premised his striking out application on grounds of no reasonable cause of action, *res judicata* and that the plaintiff's claim was scandalous, frivolous, vexatious and abuse of court process. The second defendant's striking out application was allowed on 7 February 2018.

[18] The plaintiff appealed against both decisions of the High Court, which are the appeals before us.

Findings Of The High Court

Against The Second defendant

[19] The learned High Court Judge found that the plaintiff had admitted that the second suit against the second defendant is premised on the same factual matrix and the same cause of action as the first suit. *Vide* the affidavit filed by Lim Chin Tong, director of the plaintiff dated 15 January 2018, at para. 5, the plaintiff admitted that when he filed the first action, the plaintiff did not have any evidence nor proof of the second defendant's involvement in the trespass. The only evidence the plaintiff had, was based on the information derived from the notice board erected on the land beside the plaintiff's land. The relevant paragraph of the affidavit reads:

> 5. Oleh yang demikian, saya mengatakan bahawa pada waktu yang material, kecuali *melalui keterangan papan cadangan tersebut, Plaintif memang tidak mempunyai sebarang keterangan atau bukti mengenai penglibatan Defendan Kedua (Lee Wai Soon) atau sesiapa lain, sebagai pekerja, pengkhidmat atau ejen Defendan Ketiga*. Lagipun, Defendan Ketiga didalam guaman Tuntutan Pertama menafikan langsung penglibatan dirinya samada secara sendiri atau melalui pekerja, pengkhidmat atau agennya dan telah memplid satu bentuk pembelaan sahaja terhadap tuntutan Plaintiff iaitu pada dasarnya "Defendan sama sekali tidak pernah, samada atau sebaliknya menceroboh mana-mana tanah milik Plaintiff dan melakukan kerja-kerja seperti mana yang didakwa Plaintiff ... ."
>
> (emphasis added)

[20] The plaintiff had also admitted that at the time of filing the first suit, he had no claim against the second defendant (para. 11 of the grounds of judgment).

[21] It is the finding of the learned High Court Judge that the plaintiff should have filed the claim against the second defendant earlier in the first suit. The learned High Court Judge was of the view that the plaintiff knew of the second defendant's involvement at least by the time the second defendant was brought to the Sepang Criminal Sessions Court on 23 March 2015. Given that the first suit was struck out on 5 August 2015, the plaintiff had at least five months to include the second defendant as a party to the first action but he failed to do so.

[22] The learned High Court Judge viewed the reason as to why the plaintiff did not include the second defendant nor claimed for any compensation against the second defendant in the first suit was because his losses were caused by the third defendant and not by the second defendant. His Lordship arrived at these findings premised on the evidence given by the plaintiff at the Sepang Criminal Sessions Court where the plaintiff admitted that his loss was caused by the third defendant and/or Sri Gumut only. The relevant para. 12 of the grounds reads:

> 12 ... Melalui Afidavit Sokongan Defendan Kedua yang diikrarkan pada 3 Januari 2018 dan merujuk kepada Eksibit "D6", adalah didapati bahawa Plaintif hanya membawa tuntutan kerugian terhadap Defendan Ketiga sahaja melalui Guaman Pertama tersebut dan tiada tuntutan pampasan lanjutan terhadap Defendan kedua, memandangkan kerugian yang dialami oleh Plaintif hanya disebabkan oleh Defendan Ketiga sahaja. Dalam keadaan yang sedemikian, adakah tindakan Plaintif ini merupakan suatu tindakan berdasarkan kepada princip *Res Judicata* ? ...

D6 is the notes of proceedings of the Criminal Sessions Court.

[23] After referring to the Federal Court case of *Manoharan Malayalam v. Menteri Dalam Negeri Malaysia & Anor* [2009] 2 CLJ 839; [2009] 2 MLJ 660, the learned High Court Judge found that based on the principle of *res judicata*, since the court in the first suit had dismissed the claim premised on the same issues and claim, the second defendant's application to strike out the second action should be allowed.

[24] The plaintiff submitted that the first suit involved different parties from the second suit and that the decision in the first suit was not a final decision but a decision on an interlocutory application. The learned High Court Judge found no merits in such arguments. As a result the application by the second defendant to strike out the plaintiff's claim was allowed by the High Court.

Against The Third defendant

[25] The learned High Court Judge found that the cause of action in the first and the second suits are the same. The plaintiff did not appeal against the decision in the first suit. Therefore the second suit is caught by *res judicata*.

[26] Similarly, as in the striking out application by the second defendant, the plaintiff raised the issue that the first suit involved different parties as opposed to the second suit and that the decision in the first suit was not a final decision but a decision on an interlocutory application. The reasons given by the third defendant to strike out the claim against him are not procedural in nature.

[27] The learned High Court Judge found that the order which struck out the plaintiff's first suit against the third defendant is a final order. By naming the other defendants in the second suit, the plaintiff cannot avoid the

applicability of the doctrine of *res judicata*. Therefore the High Court allowed the third defendant's application to strike out the writ and the statement of claim.

Grounds Of Appeal By The Plaintiff

[28] The plaintiff's memorandum of appeal raised the following as grounds of appeal:

(i) The second suit is not a plain and obvious case to be struck out;

(ii) The principle of *res judicata* is not applicable;

(iii) The learned High Court Judge had taken irrelevant considerations when deciding on the application to strike out the writ and statement of claim under O. 18 r. 19(1)(a) of the ROC 2012;

(iv) The plaintiff has a right to have the matter adjudicated at full trial to explain the factual matrix of their claim, *inter alia*:

(a) What the plaintiff meant by its admission that it has no evidence against the second defendant;

(b) Why was the second defendant not named as a defendant in the first action;

(c) What the plaintiff's witness meant in his evidence in the Sepang Sessions Criminal Court; and

(d) Why did the plaintiff not appeal against the first action's decision.

Our Decision

[29] It is trite law that a court in exercising its power of striking out suits under any of the limbs under O. 18 r. 19(1) of the ROC 2012 will only invoke the summary process in plain and obvious cases, where the claim is obviously unsustainable on the face of it. The burden to prove that it is plain and obviously unsustainable on the face of it, rests with the defendants. The court will not conduct a minute examination of the documents and facts of the case to decide whether the party has a cause of action or defence. The fact that the case is weak and not likely to succeed is not a ground to strike out the case. So long as the pleadings disclose some cause of action or raised some issues fit to be tried, it is enough to sustain the case for trial, and it ought not be struck out (Refer to *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293).

[30] The main issue for our determination in these appeals is whether the second suit against the second and the third defendants is barred by *res judicata*. The parties referred to the Supreme Court decision in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 and affirmed by a later decision by the Federal Court in

Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271. The plaintiff referred to the Court of Appeal decision of *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788, where it had been held that the doctrine of *res judicata* is applicable although the parties are different (also refer to the Court of Appeal decision in *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122).

[31] It is not in dispute that both the first suit and the second suit are in respect of the same cause of action involving the same subject matter, namely, trespass on the land belonging to the plaintiff. The relief prayed for is also for the alleged loss as a result of the alleged trespass of the land attributable to the extraction of sand in both the first and the second suits. The learned High Court Judge made the same findings that both the first and the second suits involve the very same issues arising from the same factual matrix. In fact, the plaintiff in item 2 of its memorandum of appeal admitted that both the suits involved the same cause of action and/or the same facts.

As Against The Third Defendant

[32] The third defendant premised his striking out application on the basis that the second action arises from the same cause of action as per the first action, namely the second action is barred by *res judicata*.

[33] We agree with the submission of the plaintiff above as far as the third defendant is concerned. The facts pleaded in the statement of claim in the first suit and the second suit as against the third defendant are the same. The cause of action is the same, namely trespass to the land. However, the plaintiff submitted that the relief prayed for in the first suit and the second suit is different in that, the remedy sought for in the first suit was for an injunctive relief against the trespass on the land, which according to the plaintiff was never determined in the first suit. Whilst the second suit was for a declaration that the act of trespass was committed.

[34] We found the arguments of the plaintiff have no merits as the relief for an injunction as sought for in the first action is already academic as the plaintiff had withdrawn the application for the injunction. This is evidenced by the order dated 30 April 2015 (p. 142 of RA 143).

[35] In any event (in respect of the second suit against the third defendant), it is also trite law that even though, as alleged by the plaintiff that the reliefs sought in the first suit is purportedly different from the second suit, *res judicata* still bites, as the factual matrices are the same, the cause of action is the same and the parties are the same namely the plaintiff and the third defendant. *Res judicata* also applies to issues or facts which are part of the subject matter of litigation which might have been and which were not brought forward, though not actually decided by the court. The relief prayed for, is premised on the same cause of action of trespass to the same land. The

declaration sought in the second suit could have been brought up earlier in the first suit. This cannot be made clearer than what had been held in *Asia Commercial Finance (M) Bhd* (above) whereby the Supreme Court held in its judgment at p. 791(CLJ); p. 197 (MLJ):

> ... When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata proveritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation- interest *rei publicae ut sit finis litium*. It is only just no one ought to be vexed twice for the same cause of action-*nemo debet bis vexari pro eadem causa* ... .

Page 791 (CLJ); 198 (MLJ) of the same case reads:

> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p. 115 which is:
>
> > The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

At p. 793 (CLJ); p. 200 (MLJ) of the judgment:

> ... It is further necessary at this stage to understand the import of the words in the said famous statement ie, " ... every point which properly belonged to the subject of litigation ...". Which Somervell LJ explained in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257 as follows:
>
> ... *res judicata* for this purpose is not confined to the issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them.

Wigram VC referred to "points" which according to Peh Swee Chin SCJ in *Asia Commercial Finance (M) Bhd* means the "points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties."

[36] It is clear that premised upon the principle as enunciated in the aforesaid cases, the plaintiff is estopped from bringing a similar cause of action on the same subject matter against the third defendant.

[37] The plaintiff alleged that the order dated 5 August 2015 is not a final order as it is a decision based on an interlocutory proceedings and that there has been a serious misdirection by the learned High Court Judge. In this respect, we refer to the case of *Hartecon JV Sdn Bhd & Anor v. Hartela*

Contractors Ltd [1997] 2 CLJ 104 where the Court of Appeal in its judgment addressed this issue of whether a decision made on an interlocutory proceedings is a final order. The court was of the view that it does not matter whether the order in question was final or interlocutory and that the principle contended for applied to both types of orders:

> [1] The learned Judge was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. **Although that was a decision made on an interlocutory matter which was purely procedural in nature, it was, nevertheless, binding on the Court and on all parties to the *lis* until its reversal on appeal**. Consequently, the decision of the learned Judge in overruling the respondent's preliminary objection had rendered the point taken *res judicata*.
>
> [2] It cannot be over-emphasised that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. Certainty and finality are the two pillars on which the judicial process rests.

At p. 113 of the case, the Court of Appeal in its judgment stated:

> If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v. Dato' Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p. 76):
>
> > In *Satyadhyan Ghosel and others v. Sint Deorajin Dobi & Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:
> >
> > > The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter- whether on a question of fact or a question of law- has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
>
> *A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see Peareth v. Marriot [1883] 22 Ch. D 182), ... Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (see Louis Dreyfus v. Aruna Chalayya LR 58 IA).* (emphasis added)

Further in the case of *Serac Asia Sdn Bhd v. Sepakat Insurance Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 the Federal Court held that:

> [3] Once a regularly obtained order or judgment had been perfected, the court was *functus officio*. The matter, as decided *vide* enclosure 6, was thus *res judicata* and could not be re-litigated. The order made under enclosure 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or re-asserted under any guise in a subsequent proceeding. The issues raised by the respondent in enclosure 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did.
>
> [4] The relitigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of *res judicata*. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine.

[38] The decision given by the learned High Court Judge in the first suit was based on the same subject matter and issue is binding on the court at a later stage in the same suit or in the second subsequent suit. An issue that has already been determined either expressly or by necessary implication cannot be raised by parties a second time in a subsequent suit.

[39] Therefore, the plaintiff's argument that the order dated 5 August 2015 was not a final order has no merits.

[40] The fact that the second suit involves other defendants is not a basis to say that the second suit against the third defendant is different from the first suit. Regardless, the principle of *res judicata* is not affected by the absence of the other parties in the first suit. What is clear is that the second suit without doubt, involves the same facts, the fact that the parties are different from the first suit does not disentitle the third defendant from invoking the doctrine of issue estoppel to bar the plaintiff from relitigating a specific issue that had been litigated in the first suit. Here, the third defendant was a party in the first suit and also a party in the second suit, except that he is being sued with other defendants. The doctrine seeks to prevent abuse of the

process of court by attempting to take a second bite of the cherry by relitigating the same issues and reliefs based on the same subject matter for which judgment had been given.

[41] The plaintiff seeks to distinguish the first suit and the second suit by stating that the capacity in which the third defendant was sued was different in that the first suit was brought through himself and/or his agent trading under the name and style of "Sri Gumut Enterprise", is misleading the court. The third defendant is the sole proprietor of Sri Gumut Enterprise and not a separate entity that was sued in his individual capacity. In any event, the third defendant was sued in his individual capacity in the first suit and also in the second suit. The third defendant retains the same liabilities as if he is the sole proprietor. In the case of *Wong Yoon Yar v. Lin Yin Thai & Ors* [1987] 1 LNS 21; [1987] 2 MLJ 714 where the court held that:

> The same situation applies to a sole proprietor. He may not wish to carry on business in his own name but prefer to choose something more colourful or meaningful to bring luck and prosperity to his business. So, he chooses a "chop" name and trades under that. But he does not by so doing create an entity separate from himself. He retains just the same liabilities and obligations in regard to his business ...

[42] Another issue raised is the fact that the third defendant pleaded guilty on the charges under s. 379 and 447 in the Sepang Sessions Court on 26 July 2016 which was one year after the decision on 5 August 2015. We are of the view that the plea in the Sepang Sessions Court cannot be a basis to override the principle of *res judicata*.

[43] It is to be noted that there has been no appeal by the plaintiff against the decision of the High Court dated 5 August 2015, but instead the plaintiff chose to file the second suit against the third defendant premised on the same set of facts and same issues. We view this as:

(i) a concession that the decision of the learned judge in the first suit was correct and therefore the plaintiff would be precluded from canvassing the same argument in the second suit;

(ii) a deliberate attempt to circumvent the necessary appeal procedure and therefore amounts to an abuse of court process.

(refer to the Federal Court case of *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233; [2001] 3 MLJ 481).

[44] Therefore, with regards to the third defendant, inevitably the second suit filed by the plaintiff is caught by the principle of *res judicata* and hence the learned High Court Judge did not err when he allowed the application of striking out of the second action by the third defendant.

As Against The Second Defendant

[45] The second defendant premised his striking out application on the grounds of no reasonable cause of action, *res judicata* and that the plaintiff's claim was scandalous, frivolous and vexatious and an abuse of court process.

[46] On whether the plaintiff has a reasonable cause of action, premised on the pleadings, it is clear that the plaintiff's cause of action is trespass to property where it was alleged that the defendants had encroached on the property and extracted sand therefrom. Therefore, this basis of striking out cannot hold.

[47] The main issue is whether the second suit is caught by *res judicata*.

[48] The learned High Court Judge had referred to and applied the averments in para. 5 of the affidavit in reply by the plaintiff which was affirmed on 15 January 2018, to make a finding that the plaintiff has no basis to institute a claim against the second defendant. The relevant paragraph of the said affidavit in reply is reproduced here when the plaintiff states:

> Oleh yang demikian, saya mengatakan bahawa pada waktu material, kecuali melalui keterangan papan cadangan tersebut, plaintif memang tidak mempunyai sebarang keterangan atau bukti mengenai penglibatan Defendan Kedua (Lee Wai Soon atau sesiapa lain sebagai pekerja, perkhidmatan atau agennya ... (Refer to RRT at pages 15-16)

[49] However, the learned High Court Judge failed to consider the averment of the second defendant in the first suit where he states:

> Begitu juga dengan pekerja seramai 6 orang tersebut, selain tiada sebarang pengetahuan mengenainya, Defendan tidak pernah menggajikan mana-mana individu untuk membuat perbuatan kelakuan menceroboh tanah milik Plaintif ...

Since the third defendant had denied that the six individuals/workers who were allegedly carrying the act of trespass on plaintiff's land were his employees/workers, then the question arose as to who are these individuals. These are matters that should be sent for trial of the second suit for the determination of who are these individuals, whether they were employed by the second defendant. The second defendant was not named in the first suit as the plaintiff did not have any idea of the involvement of the second defendant then. It was held by the learned judge that the plaintiff could have included the second defendant, five months before the first suit was struck out as the second defendant had pleaded guilty on trespass in the criminal Sessions Court.

However, we are of the view that the plea of guilt by the second defendant in the Sepang Sessions Court and the pleadings by the second defendant in his amended statement of defence that his involvement in the trespass is premised upon the representation of the other defendants that they have the authority to enter onto the land, are issues that need to go for trial. This was

never an issue in the first suit as the first suit only concerned the third defendant. The second defendant was never in the picture when the first suit was filed. In fact, from the pleadings in the first suit, the plaintiff did not know of the existence of the second defendant at that point in time.

[50] At this stage, as far as the second suit against the second defendant is concerned, it is not clear whether *res judicata* applies unlike the situation as against the third defendant. The second defendant was not sued in the first suit unlike the third defendant, who was sued in both the suits. Hence, we are of the view that, the second suit against the second defendant should go for trial.

[51] Whether the plaintiff would succeed in his claim against the second defendant is not the concern of the court at this stage. The plaintiff must be given his day in court to prove that the trespass was/was not committed by the second defendant and/or the other defendants (excluding the third defendant).

[52] The second defendant is not precluded from raising and arguing the defence of *res judicata* again at the trial. There will be no prejudice to parties, if the matter is to proceed with full trial. However, the plaintiff would be seriously prejudiced, if the matter is to be struck out at this stage, as the plaintiff would be deprived of the opportunity to prove his case. This would cause grave injustice to the plaintiff. We are minded of the position in law that the doctrine of *res judicata* was "designed to achieve justice, a court should decline to apply it, if its application would lead to an unjust result". (refer to *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1). It is also to be borne in mind that this is a striking out application by the second defendant. All the plaintiff needs to show is that there are issues fit for trial, which we found that there are. So long that there is a cause of action and there are disputed issues, the case ought to go for trial, no matter how weak the case may be. The plaintiff should be given his day in court against the second defendant.

Conclusion

[53] Therefore, premised on the aforementioned reasons, we found that Appeal 143 is caught by *res judicata*. With respect to Appeal 396, it is not clear to us that it is caught by *res judicata*. There will be no prejudice if the suit against the second defendant is to go for trial. Appeal 143 is dismissed with costs and Appeal 396 is allowed with costs.